

“And the learners shall inherit the earth”:
Life long learning and legal ethics

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I	Introduction	2
II	Why take a life long learning approach?	4
	A) Personhood and Identity	4
	B) Changing nature of Law and Society	6
	C) Public and Private Good	6
	D) If the judges can do it, so can and should the lawyers	8
III	Implications of life long learning approach for continuing legal ethics education	9
	A) Teaching/Learning	9
	B) Communities of Learning	11
IV	CONCLUSION	12

“So is there a realistic way to embed professionalism in our daily professional lives? Yes. And it is disarmingly simple. But it’s very, very hard to actually execute.... It has to do with a piece in each of us that seeks a larger meaning in what we do in our lives ... It has to do with the spirit and the soul.”

Roxie Bacon¹

“We are discussing no small matter, but how we ought to live”

Socrates

“education ... commences in the first years of childhood and lasts to the very end of life.”

Plato²

“ ... to learn from life itself and to make the conditions of life such that all will learn in the process of living.”

John Dewey³

“ ... the only adequate training for occupations is training through occupations. It is worth recalling too that work cannot be detached from the cultural and social practices in which it is situated.”

John Dewey⁴

“Tell me and I will forget; show me and I may remember; but directly involve me, and I will make it my own.”

Confucius

I Introduction

For the last several decades, but especially since the 1990’s, there has been increasing interest in, and analysis of, lifelong learning.⁵ An explicit engagement with lifelong learning has been seen in various disciplines (e.g., medicine, nursing⁶) and has operated at many levels –

¹ Roxie Bacon, “Professionalism – Changing Interior Voice to Exterior Voice” (2005) 15(4) Professional Lawyer.

² Cited in Barrow and Keeney at 53.

³ Cited in Halliday at 103.

⁴ Cited in Halliday at 104.

⁵ Several key general texts include Dorothy MacKeracher, *Making Sense of Adult Learning*, 2nd ed, (Toronto: University of Toronto Press, 200?); David Aspin et al., eds., *International Handbook of Lifelong Learning* (Boston: Kluwer, 2001); Paul Oliver, ed., *Lifelong and Continuing Education: What is a Learning Society? Monitoring Change in Education* (Vermont: Ashgate, 1999); D. Poonwassie & A. Poonwassie, eds., *Fundamentals of Adult Education: Issues and Practice for Lifelong Learning* (Toronto: Thompson, 2001); See more specifically Wain at 185-193.

⁶ [cite to examples from literature]

local, national, regional and international.⁷ It has also, slowly and perhaps inchoately, begun to manifest itself in the Canadian legal profession. For example, under the auspices of the National Judicial Institute, the Canadian judiciary has taken a lifelong learning approach to issues such as ethics, social context, technology, health and aging.⁸

However, in contrast to the judiciary, the practicing bar in Canada seems much less engaged by the opportunities and challenges of lifelong learning. While several provincial law societies have recently enhanced their Continuing Legal Education requirements and programmes⁹, such initiatives are still very much in their infancy (and even, in some quarters, face active resistance). Indeed, there is evidence to suggest that the Canadian legal profession is decidedly illinformed about the importance of life-long learning. For example, in its recent Consultation Paper on An Approved Common Law Degree, a Task Force of the Federation of Law Societies has recommended a regime of law school accreditation that completely fails to recognize that law school education is but one part of a much larger process of life-long learning. The result is a deeply flawed Consultation Paper which, if adopted, will not merely do nothing to advance the project of life-long learning, but in fact will have a regressive impact upon legal education in Canada.¹⁰

⁷ See Aspin et al. eds; European Commission, *Making a European Area of Lifelong Learning a Reality* (Brussels: Directorate-General for Education and Culture and Directorate-General for Employment and Social Affairs, 2001); ILO, *Lifelong Learning in the Twenty First Century: The Changing Roles of Educational Personnel* (Geneva: ILO, 2000).

⁸ [cite]

⁹ [cite]

¹⁰ See both the Law Dean's Response at the CALT/CLSA Response to Task Force Consultation Paper. The leadership of the profession in the United States appears to be much more aware of the importance of lifelong learning. See e.g., *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992). [McCrate Report].

“the skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues through a lawyer's professional career.”

Ibid. at 3. [emphasis added].

In this presentation we hope to make a case for the legal profession to join the Canadian judiciary. We will bring together some basic principles of life-long learning with the topical area of legal ethics. We will seek to show why lifelong learning is an appropriate approach for law (and especially legal ethics) to take. We will then explore the implications of taking such an approach for legal ethics education.

II Why take a life long learning approach?

Our research indicates that although there has been very little discussion in legal professional circles about life-long learning there is an extensive literature in the educational sphere that addresses the opportunities and challenges of such initiatives. In this section we will briefly identify four insights from the educational literature which, we suggest, support our claim that the legal profession should take a life long learning approach to continuing legal ethics programmes for Canadian lawyers.

A) Personhood and Identity

Analysts of life long learning, sometimes explicitly but usually implicitly, invoke a theory of personhood and identity as a key foundation for their arguments. For them, a human being is a protean character, something that is dynamic, flexible, and capable of ongoing reconstitution and self-actualization.¹¹ Aspin et al, for example, argue

... one of the chief characters by which human beings may be distinguished from other forms of organic entities and sentient creatures is their endless curiosity, their desire to have their questions answered, their awareness of the need to cope with and master change, and their propensity always to seek improvement in their situation.¹²

¹¹ Marshall in Aspin at 118; Usher at 168, MacKeracher at 174.

¹² Aspin et al at xvii.

The self is always a situated self, a contextual self, a self whose identity is always a work in progress,¹³ and whose potential is always embedded in a larger set of social, economic, political and cultural forces.¹⁴ These forces can be both enabling and restraining, empowering and constraining, emancipating and repressive. Lifelong learning is one key aspect of how the self can come to terms with this larger set of circumstances. Thus, according to Aspin and Chapman, lifelong learning seeks to provide individuals with capabilities:

people will need to know and to learn, in order to perpetuate their lives as well functioning and productive individuals in present and future economic conditions, understand, grasp and seek to expand the opportunities offered to them by the right of participating in the political institutions of the modern democratic state, and to judge intelligently and make well-informed choices from among a range of activities that will increase their independence, confirm their autonomy and extend their cultural horizons.¹⁵

Advocates of life-long learning emphasize the importance not just of competencies, but capabilities. Competency is primarily instrumental, technical and mechanistic in nature; capability, by contrast, is more holistic in nature, focusing on character and identity:

The purpose and benefit of learning may be a particular ‘competence’ which alters our capacity to intervene in experience, but its central purpose is to enable such skills to develop our distinctive identity and *capability* as a person.... Learning is becoming, enacting the distinctive capabilities. Learning leads to action and grows out of the experience which action enables: it creates the capacity for *self-creation*.¹⁶

It is not that competencies such as effectiveness and efficiency are not beneficial. Rather, the argument is that they are not sufficient as professional goods, they are managerialist virtues rather than holistic virtues. A focus on capability and not just competency helps us to think about being not just doing,¹⁷ our soul not just our role.¹⁸

¹³ Murrell, Valparaiso at 496.

¹⁴ See Devlin.

¹⁵ Aspin and Chapman at 17.

¹⁶ Ranson, Rikowski & Strain at 147.

¹⁷ Harris, Valparaiso at 359.

B) Changing nature of Law and Society

[insert data re: change and flux from JD e-mail] There are at least two areas of change that are relevant to our argument. First, the law is constantly changing. Whole areas of law exist now that were not even contemplated when practitioners who are twenty years out went to law school. Similarly, new approaches to legal analysis have been developed. Second, the social context within which law operates (and which lawyers must understand in order to practice competently) is also constantly changing.

Life long learning recognizes the fluidity, perhaps even turbulence, of the (post) modern condition. It is now widely accepted that ours is a “risk society.”¹⁹ Most people, including lawyers, are likely to experience significant personal and career changes in the course of their lives. Knowledge, technology, experiences and relationships are in a constant state of flux.²⁰ As a result the rules and norms that govern our lives are also in a state of flux, they are also constantly contested.²¹ As Janis Clark has argued, it is no longer sufficient to be a “learned” profession; we must be a “learning” profession.

C) Public and Private Good

Life long learning is identified as a form of “investment”, a personal investment, a social investment, and a community investment. As such life long learning is simultaneously both a private good and a public good.²² Thus for Aspin et al. life long learning can engender a triad of virtues: “education for a more highly skilled workforce; personal development leading to a more

¹⁸ Murrell at 505; See also MacKeracher, Chapter 9.

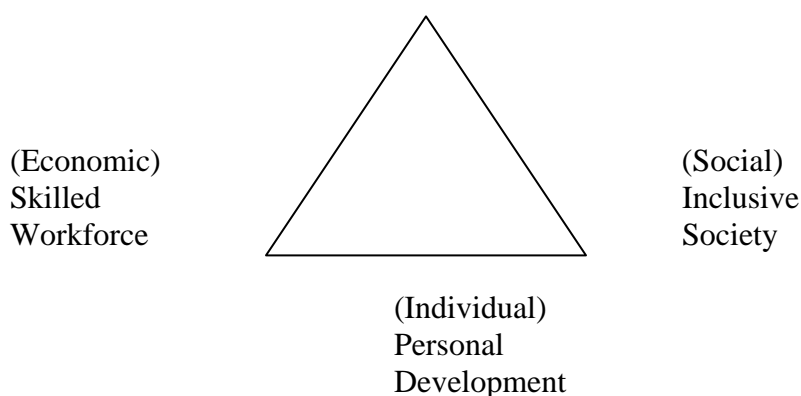
¹⁹ Ulrich Beck.

²⁰ Hagar at 83.

²¹ Unger.

²² Aspin et al at xxi; Bagnale at 38.

rewarding life; creation of a stronger and more inclusive society.”²³ Or as they rephrase it a few lines later, life long learning “will help achieve a variety of policy goals that include building a strong adaptable and competitive economy, providing a fertile range of opportunities for growth and personal development and developing a richer social fabric where principles and ideals of social inclusiveness, justice and equity are practiced and promoted.”²⁴ This can be represented as follows:



Advocates of life long learning are sensitive to the possible tensions between this triad of virtues. In particular, they are concerned that an overemphasis on the development of economically salient utilitarian skills may result in the marginalization of the values of individual autonomy and social inclusion.²⁵ This concern about an excessive focus on human capital formation is also especially pertinent for lawyers. If life-long learning is conceived of as C.L.E. on substantive law and mechanical skills then it misses the mark. Thus, we suggest that a focus on legal ethics helps to counteract the dull compulsion of economic virtues and encourages the development of the other virtues. In particular, a legal ethics project, if properly designed and delivered, can help develop the capabilities of “understanding different perspectives, communicating an understanding of one’s own perspectives to other people, justifying one’s own

²³ *Ibid.* at xxi.

²⁴ Aspin et al at xxi.

²⁵ See e.g. Bagnall at 47; Barrow & Keeney at 51; Ransom, Rikowski & Strain at 135.

actions, criticizing those of fellow citizens, and responding to their justifications and criticisms.”²⁶

D) If the judges can do it, so can and should the lawyers

In the Introduction we briefly referred to the work of the National Judicial Institute in developing life long learning programmes for Canadian judges. In particular, we want to refer now to the N.J.I.’s “Social Context Education Programme, Phases I and II”. Briefly stated, in response to a developing awareness of inequality and discrimination in Canadian society and law, the Canadian judiciary endorsed and adopted a programme of “social context education.” This was an ambitious project that brought together judges, academics, lawyers and community representatives to conceptualize, design, deliver and evaluate judicial education programmes that were “comprehensive, indepth and credible ...”²⁷ The basic architecture for this programme was the “Ten Principles of Social Context Education”²⁸ which we have previously explored in the legal ethics literature.²⁹ This programme is explicitly grounded in a life long learning approach and, as social context education, is a part of legal ethics education. In taking a life long learning approach to social context education, the judges have already recognized the need to take a life long learning approach to legal ethics (as social context is a part of legal ethics). Through the success of the NJI social context education programme, they have also demonstrated the feasibility of taking such an approach in a legal ethics context. If they can do it, we would argue, so can and should the legal profession.

²⁶ Enslin, Pendleburg & Ijattas at 75.

²⁷ Resolution of the Canadian Judicial Council, March 1994, *ibid*.

²⁸ The key architects of those principles were Justice Donna Hackett and Professor Brettel Dawson.

²⁹ See Appendix 1 “Ten Principles of Legal Ethics Learning” for a discussion of how these N.J.I. principles might be translated to the context of legal ethics education for lawyers.

III Implications of life long learning approach for continuing legal ethics education

A) Teaching/Learning

Having identified the significance of both agency and constant change, advocates of the life long learning then proceed to address the implications for teaching and learning theory. Their central proposition argues that, logically as we are talking about life long learning and are therefore talking about education for adults, we need to go beyond pedagogy – the teaching of children – to androgogy – the teaching of adults. This takes us to a consideration of three key elements of androgogy.

First, there must be a shift in emphasis from teaching to learning.³⁰ Barbara Bichelmeyer, drawing on Malcolm Knowles' *The Adult Learner*, has developed the following table to demonstrate some of the differences between pedagogy and androgogy:

ASSUMPTIONS ABOUT LEARNERS		
About	Pedagogical	Andragogical
Concept of learner	Dependent personality	Increasingly self-directed
Learner's experience	To be built on more than used as a resource	Rich resource for learning by self
Readiness to learn	Uniform by age-level and curriculum	Develop[s] from life tasks and problems
Orientation to learning	Subject-centered	Task- or problem-centered
Motivation	By external rewards and punishment	By internal incentives, curiosity

Adults are increasingly self-directed and education programs should work with the internal incentives and the adults' wealth of values, knowledges, experiences, understandings, skills and needs.³¹ Viewed in this light, learning is characterized:

as a process of making sense of life's experiences and giving meaning to whatever 'sense' is made; using those meanings in thinking, solving problems and making choices and decisions; and acting in ways that are congruent with these choices and decisions as a means of obtaining feedback to confirm or disconfirm

³⁰ See e.g. Mackeracher, *supra* note xxx at 4.

³¹ P. Murrell; Conison Valparaiso at 336-337.

means and choices. Learning results in relatively permanent changes not only in meanings and behaviours but also in the way one goes about making sense, making meaning and thinking, making choices and acting.³²

Second, the shift from pedagogy to androgogy means that education is no longer primarily about “front end teaching” but rather about creating systems that facilitate ongoing opportunities for understanding, analysis, reflection and problem-solving.³³ The focus is on “situated learning.”³⁴ For lawyers this will mean creating new and innovative educational structures/organizations that might incorporate not just practitioners and legal academics but also judges, non legal academics, and other experts including members of the community.

Third, the most effective learning programmes are those that focus on “learning how to learn.”³⁵ In pursuit of this goal, androgogy should seek to develop the three capabilities of emotional intelligence, critical thinking and generative learning. Emotional intelligence is “the ability to motivate oneself and persist in the face of frustrations, to control impulses and delay gratification, to regulate mood and keep distress from swamping one’s ability to think, to empathize with others, and to hope.”³⁶ Critical thinking “is not a skill but an attitude of mind: a disposition not to take statements for granted, not to accept dogmatic beliefs no matter how sanctioned, not to go along with the dominant simply because they are a majority.”³⁷ Generative learning is “learning that enhances our capacity to create.”³⁸ When we combine these three capabilities – emotional intelligence, critical thinking and generative learning – we then move

³² MacKeracher at 7-8.

³³ For a discussion of one such innovative programme see Murphy & Schwen in Valparaiso at 521.

³⁴ MacKeracher at 201-203.

³⁵ See e.g. MacKeracher at 15-16; 129.

³⁶ Mackercher at 137, synthesizing Goleman.

³⁷ Snook at 162.

³⁸ Murrell, Valparaiso at 500.

into what cognitive developments theorists call the fifth stage of intellectual development, i.e. “post-formed or dialectical operational thought.”³⁹

B) Communities of Learning

Traditionally educational theorists have focused their analyses on the conventional institutions of learning – schools, universities, community colleges etc. Although advocates of life-long learning do not abandon these institutions, they argue that we also need to consider other important “communities of learning” such as firms, social groups, religious communities, towns etc.⁴⁰

We suggest that the professions, including the legal profession, also constitute communities of learning.⁴¹ In fact, we would suggest that given the functional diversities of the Canadian legal profession – private/public lawyers; sole practitioners; national and multinational lawyers; urban/rural lawyers; criminal/family lawyers; corporate/poverty lawyers etc., - there are multiple legal communities of learning. As a result, life-long learning must fit tongue in groove with the needs and potential of these diverse legal communities of learning.

Life long learning does not understand learning as simply the acquisition of personal, individual substantive knowledge and skills. Rather, as the emphasis on community indicates, it sees learning as relational,⁴² a collaborative process, where people learn together and take collective responsibility for their androgogical obligations. This is especially important for lawyers. Historically, legal education and legal practice have encouraged highly individualistic

³⁹ See Appendix 2 “Cognitive Development Theory and Legal Ethics Analysis” for a further elaboration of this point.

⁴⁰ See e.g. Peter Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (xxx 1990); E. Wenger, R. McDermott & W. Snyder, *Cultivating Communities of Practice* (Boston, Mass.: Harvard Business School Press, 2002); N. Shapiro & J. Levine, *Creating Learning Communities* (San Francisco, Jossey-Bass, 1999); Murphy & Schwen in Valparaiso 521 at 537-540.

⁴¹ See also Shepard, Valparaiso at 318-319.

⁴² MacKeracher, Chapter 8.

and competitive approaches to learning and doing. As a result, many lawyers have a very high level of confidence and regard in their own understanding of problems and potential solutions. Life-long learning with its espousal of communities of learning questions this worldview. It suggests that collaborative approaches are likely to generate better analyses and solutions rather than individual analyses, and that “learning how the learn together”⁴³ is a vital step.

IV CONCLUSION

In sum, we believe that taking a life long learning approach to continuing legal ethics education would be good for the reasons canvassed above: it is consistent with a rich understanding of personal identity; it fits the reality of a constantly changing world within which law exists; it has the capacity to produce public and private goods; and clearly it can be done (as it has been done successfully by the judges in the narrower context of social context education). The implications for legal ethics education are many: we must shift from pedagogy to androgogy; we must develop systems that facilitate opportunities for ongoing education; we must nurture communities of learning; and, perhaps most importantly, we should strive to enhance not just our competencies but our capabilities. In other words, we should and we can.

⁴³ Aspin et al at xi; Aspin & Chapman at 21-22; MacKeracher at 17; Ranson, Rikowski & Strain at 147.